Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Rules and Policies Concerning	)	MM Docket No. 01-317
Multiple Ownership of Radio Broadcast	)	
Stations in Local Markets	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244

TO THE COMMISSION

REPLY COMMENTS OF THE MINORITY MEDIA AND TELECOMMUNICATIONS COUNCIL

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SUMMARY

The low level of minority ownership in radio is a national disgrace. Redressing that horrible historic wrong should be the Commission's <u>first</u> objective in this proceeding.

MMTC has occupied the sparsely populated middle of the debate between those advocating re-regulation and those advocating deregulation. Our Free Speech Radio Concept would promote diversity, competition, variety, efficiency and minority ownership simultaneously. Moreover, participation would be voluntary.

MMTC favors a balance between platforms and independents, thereby capturing the variety and efficiency benefits of one business form and the diversity and niche programming benefits of the other. To preserve this balance, the Commission should ensure that the platforms do not control so much advertising revenue that well run independents cannot survive or offer meaningful local service. MMTC offers a formula defining when a market "tips" in this manner. Our formula is more objective and practical than the arbitrary 50/70 screen. It is based on the operation of radio markets, it is applicable to any market, and it can be understood by anyone who has mastered 9th grade algebra.

To soften the parties' sharp differences, the Commission should convene a negotiated rulemaking. Getting the stakeholders together in a room could make the Commission's work far easier and the prospects for judicial affirmance much

greater. Negotiated rulemakings may be the answer to the impossible question posed by the Court's interpretation of the 1996 Act in Fox Television: how the Commission can review every rule every two years without breaking its budget.

The Minority Media and Telecommunications Council ("MMTC") respectfully offers its Reply Comments in this proceeding.[1/]

I. The Most Important Issue In This Proceeding Is The Future Of Minority Ownership

In these Reply Comments, we explain why the Commission should strive for a balance of platforms and independents, and how Free Speech Radio can help promote variety and diversity simultaneously. We also offer a formula the Commission could use to tailor its oversight of radio advertising revenues to promoting diversity. Yet these points pale in comparison to the most important issue in this proceeding: how to protect and promote minority ownership.

In no industry regulated by the Commission is minority ownership more critical, or more threatened by structural deregulation, than in radio. As our research demonstrated, the number of minority owned stations has increased slightly since 1997 -- from almost none that year (3%) to barely more than none in 2001 (4%). While this tiny step was being taken, twenty minority owned radio companies disappeared -- a profound loss for diversity of voices among communities and within the minority community.[2/]

When those not positioned to develop platforms are suddenly faced with deregulation in massive and sudden doses, they usually lose their battle to survive. Since the repeal of the Carroll Doctrine two decades ago, much of the debate over deregulation presumes that the FCC should not protect "losers." This paradigm

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1/ The views expressed in these Reply Comments are the institutional views of MMTC, and do not necessarily reflect the individual views of each of its officers, directors or members.

2/ See Kofi Ofori, "Radio Local Market Consolidation and Minority Ownership" (MMTC, March, 2002) (Appendix 1 to MMTC's Comments) at 10-12.

implies that a "loser" has only itself to blame for its loss. In broadcasting, minorities are not well positioned in heft or scope for deregulation, but their predicament wasn't caused by any lack of ability or talent. Instead, minorities had a 60 year late start. For this they could largely thank the FCC itself, which was blissfully unaware of the entirely predictable consequences as it licensed and relicensed thousands of segregationists and discriminators over the course of nearly three generations.[3/] Who did the Commission think would drink from the "winners" cup, filled with the soup of segregation the Commission had brewed?

The allocation of valuable spectrum space protection almost entirely to White people, because of their race, for 60 years is one of our greatest national scandals. Yet the NPRM did not even contain the words "minority ownership."[4/]

The NAB's Comments were typical. Without mentioning minority ownership, the NAB concluded:

> [t]he existence of numerous standalone and duopoly stations... shows that barriers to entry for new owners remain relatively low, as non-group owned stations are still available for purchase by prospective broadcasters. 5/

With all of its expertise, the NAB has to know better. The fact that something exists does not mean it is "available for purchase" much less that a new entrant has the means to purchase it. Not one of the (mostly minority) graduates of the NAB's superb

3/ See MMTC Comments, pp. 7l-l04.

4/ To the Bureau's credit, after this omission was pointed out,
the Bureau expressly welcomed comments on minority ownership. See Letter to David Honig from Roy J. Stewart, Chief, FCC Mass Media Bureau, March 8, 2002 (Appendix 3 to MMTC Comments).

5/ NAB Comments at 42.

two-year old ownership training program has yet found any stations to purchase -- because almost no financing is available to new entrants seeking to buy the small AM and FM facilities that are typically available.

Barriers to entry remain huge, especially for minorities. Yet the Commission's efforts to support minority ownership have foundered. Consider these facts:

- The FCC adopted minority ownership policies in 1978 when there were only 60 minority owned stations. That number quintupled by 1995, when Congress repealed the tax certificate policy.

- The next year, comparative hearings died with the 1996 Act. No minority enhancement was built into the auction rules because the Commission had not done any Adarand studies. Further, the Commission decoupled the minority ownership rulemaking docket from its multiple ownership and attribution dockets -- leaving the minority ownership docket dormant to this day.

- The Commission finished its Adarand studies and published them in 2000, but did not propose any new rules based on them. Eighteen months after their publication, the Adarand studies are either gathering dust, or the Commission has not yet announced its plans to act on their findings.

- The Commission eliminated its TV duopoly rule in 1999. In 2000, faced with MMTC's prediction that in three years half of the (then 33) minority owned television stations would be gone, the Commission decided in 2001 not to consider the impact of its decision on minority ownership, citing the need to review the Adarand studies.

- Three years have passed since local TV deregulation, and MMTC's prediction has unfortunately come true. Today there are only 17 minority owned television stations, and many of them are endangered. 6/

The gross misallocation of one of our greatest national resources is part of what Gunnar Myrdal in 1946 called our

"American Dilemma"; it is part of what Dr. Martin Luther King in

6/ These points are discussed in MMTC's Comments, pp. 4-7.

1957 called "the reason why we can't wait." A decision that does not honestly come to grips with this national disgrace will not be worth the virtual papyrus on which it is electronically engraved.

In particular, elimination of the ownership caps without any ameliorative measures would hurt minority owners deeply. Only a handful of minority owned companies -- the four that are publicly held and a handful of others -- have attained the critical mass required to take advantage of any sudden lifting of the local ownership caps. Until the Commission implements a meaningful plan to protect and preserve minority ownership, it is premature to consider deregulation.

To preserve minority ownership, the Commission should:

1. Eliminate barriers to entry by putting a tax deferral program at the top of its legislative agenda.

2. Prevent platforms from selling spots below cost, or giving away spots on the platform's urban or Spanish stations in order to destroy an independent urban or Spanish station.[7/]

3. Convene a negotiated rulemaking,[8/] and insist that the negotiators not return to the Commission until they have hammered out a proposed solution to the minority ownership dilemma.

II. MMTC's Approach Lies At the Middle Of The Debate

A. The Right Balance Between Platforms And Independents

MMTC finds itself squarely in the relatively unpopulated middle of the multiple ownership debate. With the exception of our

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7/ <u>See</u> pp. 17-18 <u>infra</u>.

8/ <u>See</u> MMTC Comments, pp. 174-76. <u>See</u> also pp. 27-28 <u>infra</u>.

Free Speech Radio proposal, very little has been offered by the proponents of both poles in the debate on how to promote competition, variety, diversity, efficiency and minority ownership simultaneously.

We occupy the middle of the debate because neither more re-regulation nor more deregulation are desirable outcomes. More re-regulation could be confiscatory, and while it would surely result in more viewpoint diversity it would result in less diversity of mainstream formats and less efficiency. On the other hand, deregulation would be irreversible if it proves to be a mistake.[9/] Deregulation might result in more format diversity and efficiency, but there is little doubt that it would result in less viewpoint diversity.[10/] Thus, we advocate a balance between platforms and independents, with the ownership limit set below the point where the market "tips", i.e., where independents cannot provide a meaningful local service or even survive.[11/]

To preserve this balance, the Commission should ensure that the platforms do not control so much advertising revenue that well run independents cannot survive or offer meaningful local service.

When an agency administers a public resource of national importance, it should strive to maximize consumer welfare, even if that means that the large companies in the industry do not extract

9/ For example, duopoly has cut the bottom out of minority TV ownership. In 1999 there were 33 minority owned TV stations; now there are 17, with many of those 17 on the ropes. Yet almost no one advocates repealing TV duopoly. Instead, the debate is dominated by those seeking more duopolies or even triopolies.

10/ *See* pp. 11-13 *infra*.

11/ *See* pp. 19-27 *infra*.

every last possible dollar. That is especially true where the industry has already been given a huge and valuable gift of protected and exclusive use of public property. Left unregulated, the market would quickly and irreversibly consolidate away all but a handful of independent voices. In some industries, that may not matter: no one would mourn very much if the last independent manufacturer of toasters were absorbed by a conglomerate. In radio, however, diversity matters enough to mourn its loss, because radio is so critical to the nation's democratic values and its cultural environment.

Just as it would be wrong for platforms to dominate radio markets, it would be wrong to break up the platforms in markets that are not at risk of tipping past the point where the independents cannot survive and thrive. Platforms offer advantages no independent can offer, particularly variety within the mainstream formats.[12/] Efficiencies offered by platforms may also allow platforms to undertake certain local initiatives that independents cannot afford.[13/]

Thus, the Commission should find that the public is best served by a healthy and protected balance between platforms and independents.

B. <u>FAQs About The Free Speech Radio Concept</u>

Since we offered our Free Speech Radio proposal, we have received numerous questions about it. Here are answers to some of the most commonly asked questions.

12/ *See* pp. 14-16 *infra*.

13/ *See* pp. 15-16 *infra*.

1. <u>Why the name "Free Speech Radio"?</u>

Free Speech Radio is designed as a way to advance the public's interest in having access to a wide variety of viewpoints -- an objective we believe flows from the First Amendment. The name "Free Speech Radio" is not cast in stone, however. As long as the concept is fairly considered, it does not matter what the Commission chooses to call it.

2. <u>Why would a company want one of its stations to share time with another station. Hasn't the Commission had poor experience with share-times in comparative hearings and LPFM?</u>

Share times did not take hold in comparative hearings and LPFM because the Commission insisted on them as a forced last resort to resolved contested cases. A competitor for an allotment is often the <u>last</u> company one would trust to be thrown together with in a share-time. On the other hand, Free Speech Radio would come into being through friendly, not forced, share-times. Channel bifurcation for Free Speech Radio would be analogous to cooperating with a competitor to build a tower, or to a newspaper JOA.[14/]

3. <u>One component of Free Speech Radio is that a platform operator gets an additional station. That means the platform operator is swallowing up a fulltime independent voice even as it is creating a parttime one. Isn't that a setback for diversity?</u>

A key feature of Free Speech Radio is "two for one": to get an additional station (at most 148 hours/week, with the co-channel Free Speech Station having at least 20 non-nighttime hours/week) a platform owner would have to bifurcate the additional station and also bifurcate one of its preexisting stations. Further, both Free Speech Stations would be expected to broadcast at least 50%

nonentertainment programming. Thus, the concept is not "bifurcate one, get one more." It is "bifurcate two -- which are then improved -- then get one more." This guarantees that each bundle of connected transactions results in a net gain in source and viewpoint diversity.

4. Why is Free Speech Radio necessary when time brokering is already permitted?

There are two principal reasons.

First, in many markets, no one does time brokering, or those that broker time have far too little inventory to accommodate all significant niches.

Second, the programmer has little influence over its lead-in program, or even which hours of the day it is assigned. Indeed, the programmer can be canceled almost at the whim of the station owner. Consequently, programmers, especially local programmers, have always had profound difficulties raising capital. Programming costs are sunk costs, so they cannot be recouped in the event of a cancellation. A cancellation usually leaves the programmer with no way to reimburse the initial investors who provided the startup capital that covered the sunk costs. No one will invest in a company whose business plan is to basically rent airtime, with little protection and breathing room to refine the programming, make mistakes, and correct them. Only licensees have that privilege. That is why the market has resoundingly and for generations not invested in local niche programmers that buy blocks of time. A Free Speech Station would be a real radio station. Its owners would exercise complete control over their airtime, permitting them to attract capital and provide a viable service.

5. Won't the incompatibility of formats on the same frequency be confusing?

Television stations broadcast different "formats" throughout the day. Cable channels designed like radio stations (e.g., VH1, MTV and BET) also air different formats on the same channel at different times. Some radio stations do this too: MOR stations have multiple formats, all day, all the time.[14/] The public is accustomed to this and is not confused at all.

6. How will members of the public with complaints know which licensee they're complaining about?

This is a legitimate but an easily resolvable issue. A complainant is already expected to provide the time of the broadcast which is the subject of her complaint. Share-times' hours of operation are a matter of public record.[15/] If the Commission receives a complaint serious enough to require the licensee to respond, it would be a simple matter for the Commission's staff to check to see which licensee it is. If the wrong station gets the complaint, the station need only forward the complaint to the other station on the same frequency. Share times have operated this way for over two generations without major difficulties.

14/ The concept may be returning to big-market radio. See, e.g., "Infinity's talk WCKG-FM, Chicago considering weekend music programming," Inside Radio, April 26, 2002, p. 2, noting that WCKG-FM "is considering music programming on the weekend to replace the brokered shows not airing" on WCKG-FM. The station otherwise airs a talk format.

15/ See 47 C.F.R. §73.1715 (share-time stations' division of hours "is considered part of their licenses.")

7. Will anyone want to bifurcate a channel or try Free Speech Radio?

The only way to find out is to try. The Mickey Leland Rule was little used, but the 1981 Clear Channel decision's AM eligibility criteria, the distress sale policy and the tax certificate policy were used quite often.[16/] Each of these initiatives was voluntary, as Free Speech Radio would be. We ask only that the Commission give it a try, monitoring it closely. In two years, the Commission has to reevaluate all of its rules anyway (thanks to the Court's interpretation of the 1996 Act in Fox Television), so there will be an early opportunity to determine whether Free Speech Radio was worth the effort.

With the parties to this proceeding so polarized, this is virtually the only moderate proposal that has been offered as a means of fulfilling the reasonable objectives of all stakeholders. Before re-regulating or deregulating further, the Commission should at least experiment with Free Speech Radio. Perhaps it will work so well that there is no longer any clamor for re-regulation or for deregulation.

16/ See MMTC Comments, pp. 64-65 (Mickey Leland Rule, Clear Channel AM eligibility criteria); id., p. 6 n. 10 (tax certificate, distress sales).

III. The Commission Should Preserve Multiple Sources Of Information And Programming

A. Multiple Owners Provide Viewpoint Diversity

Some parties maintained that a single owner of multiple stations can be trusted to provide a multiplicity of viewpoints.[17] No empirical research was offered to support this assertion, however. On this issue we generally associate ourselves with the views of the Office of Communication of the United Church of Christ.[18] Multiple station owners can, and do, broadcast only their own viewpoints,[19] or only viewpoints falling within a range

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17/ See Viacom Comments, p. 30 ("[i]t is unlikely, in fact, that there are many broadcasting companies that are operated for ideological purposes, with all stations in a group hewing to a particular political philosophy in their programming and presentation of public issues. To the contrary, most broadcasting entities - and certainly the large media concerns that are, or are part of, publicly traded companies - are operated to maximize economic returns and shareholder value, and not to advance specific political views.") See also Clear Channel Comments, p. 15 (publicly traded companies have "an obligation to operate their stations not only to serve the public interest, but also to serve their shareholders by seeking to maximize the value of the company stock. Station owners cannot accomplish this by using stations as megaphones to blare their 'viewpoints' and programming preferences. Thus, programming all of its stations, either nationally or locally, to espouse a single viewpoint in the context of news or public affairs simply is not an option for a broadcaster.")

18/ See UCC Comments, pp. 3-4.

19/ A good example of a group media owner providing multiple viewpoints is Gannett. USA Today's editorial page always prints its own view and an opposing one; local Gannett papers and television stations are liberal or conservative based on the local editorial board's composition and discretion. Among radio broadcasters, Clear Channel, Viacom, Cox and Emmis, among others, have tended to follow Gannett's approach. But these companies' policies flow from their founders and CEOs' journalistic and media operating roots, rather than from any market structure imperative. There is no obvious reason why a group media owner would not use its market power in the manner of the old Hearst dynasty -- to throw its weight around and shut out those with whom it disagrees.

(n. 19 continued on p. 12)

of those the owner deems responsible or appropriate (including those thought not to offend advertisers or other businesses),[20/] or no viewpoints at all.[21/] A multiple owner may choose to broadcast many different views, but it need not do that. The day after deregulation, it could decide to shut out all but its own views, and the Commission would (and should) be powerless to respond.

While some anecdotal evidence in this proceeding suggests that some platform operators offer multiple viewpoints, no evidence suggests that platform owners are as likely (much less that they are substantially more likely) than several independently owned companies to offer several independent viewpoints.

19/ (continued from p. 11)

For example, CanWest Global Communications, Canada's dominant newspaper publisher (Toronto National Post, Montreal Gazette, and 132 others, plus sixteen television stations and seven networks) has required all of its daily papers to run the same editorials, with rebuttals sometimes prohibited. The company has also begun to censor local columnists with whom they disagree. See Aaron J. Moore, "Ownership: A Chill in Canada," Columbia Journalism Review, March/April 2002, p. 11. Sinclair Broadcast Group's nearly 60 television stations are reportedly also required to air editorials produced at the corporate headquarters.

20/ See, e.g. EXTRA Update, June, 1998, p. 1 (quoting News Corp. executive after two Fox TV reporters in Tampa were fired for doing a critical investigative report on Monsanto, "[w]e paid $3 billion for these TV stations. We will decide what the news is. The news is what we tell you it is.")

21/ See MMTC Comments, pp. 13-19 (discussing most broadcasters' failure to provide any serious or substantial discussion of public issues since radio programming was deregulated). Even short, noncontroversial PSAs are barely offered anymore on commercial stations. See Graeme Browning, "Shouting to be Heard: Public Service Advertising in a New Media Age," Kaiser Family Foundation (2002) (finding that while 25% of TV and cable network airtime is devoted to paid advertising and promotions, only 15 seconds per hour (0.4% of all airtime) is devoted to PSAs, and 43% of this is located between midnight and 6 AM, with only 9% during prime time.)

It is a mistake to base forward looking structural regulations on the voluntary behavior of some broadcasters. The only reliable way to foster a multiplicity of viewpoints is to continue to preserve multiple independent owners.

B. There Are Modest, Weak Substitutes For Radio, But Their Existence Does Not Diminish The Need For Source And Viewpoint Diversity In Radio

Some commenters urged that the Internet has already obviated the need for multiple radio ownership. Perhaps that will happen someday, but Internet radio has hardly become a substitute for the real thing.

Every industry has imperfect "substitutes" in other industries. At some level, a bicycle is a substitute for a car, and at some level, an urban roof garden is a substitute for a national park. At some level, the Internet is a substitute for radio. But it is a poor substitute.

One commenter suggested that in-car and at-work radio listening are not the "sole opportunity for any particular group to obtain news and opinion information" and that "[a]t work, people would just as likely have access to Internet radio as to conventional radio."[22/] We respectfully disagree. Farmers, laborers, cashiers, and teachers cannot use the Internet at work. Most workers who stare at a computer screen on their jobs are supposed to be doing their jobs, not listening to Internet radio.

22/ Viacom Comments, pp. 15-16.

Even when the Internet is available, its accessibility to the public is still severely truncated.[23/] As UCC pointed out, there is a 50% gap in Internet access between those earning less than $25,000 per year and those earning more than $75,000.[24/]

Consequently, it is at best premature for the Commission to declare that radio listeners do not need diversity protection.

C. Platforms Provide Variety, And Independents Provide Niche Service. Thus, The Commission Should Foster The Coexistence Of Platforms And Independents.

As MMTC's research made clear, niche formats such as bluegrass, the blues, classical, jazz and Asian language programming are done by independents.[25/] Platforms either do not know how to do niche programming, or they find it more attractive to offer several hybrids of mainstream formats. BIA's research did

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23/ The availability of the Internet can be overstated. See, e.g., David Pritchard, "The Expansion of Diversity: A Longitudinal Study of Local Media Outlets in Five American Communities" (2002) at 15 (Attachment A to Viacom Comments). The study counted several Internet sites as viable media outlets that compete with radio stations, suggesting, e.g., that "[t]he public library in Florence [SC] was a popular place for people to use the Internet, and the public schools in Florence had an aggressive program to provide Internet access to all students." However, students in school are not supposed to be listening to either Internet or over the air radio. Further, with 126,000 people in the Florence market, it would require 150 continuously used Internet terminals, operating seven days a week and twelve hours a day, just to accommodate 10% of Florence's population for just one hour per week each of Internet radio listening. The Florence County

Library System and its five branches actually have 49 Internet terminals, and the branches' operating hours vary from 15.5 to 77.5 hours per week. Interview with Aubrey Carroll, Head of Youth Services and Head of Computer Services, Florence County Library System, May 6, 2002.

24/ UCC Comments, p. 9 n. 28.

25/ See MMTC, "The Relationships Between Platform Size And Program Formats In Commercial Radio," March 18, 2002 (Appendix 2 to MMTC Comments), pp. 21-22.

not address the question of who offers niches; our study demonstrated that independents are the overwhelming source of niche formats.[26]

The choice between a completely deregulated and a completely re-regulated radio industry would be a Hobson's choice between multiple niches and mainstream variety. We need both. In a village with a Wal-Mart that killed the downtown business district, it is easy to find 21 styles of blue jeans, but impossible to buy a violin. In a village without a Wal-Mart, it is easy to find a violin and three styles of blue jeans for sale, but it is impossible to find 21 styles of blue jeans at low prices. Few people would choose to live in either village.

Efficiencies offered by platforms may also allow a platform to undertake certain local initiatives that no independent, or even a coalition of independents, could provide. For example, a six-station platform may be able to help promote diversity by offering a training program or job fair on a scale that six

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26/ See BIA Financial Network, "Has Format Diversity Continued To Increase?" March 27, 2002 (Attachment 1 to NAB Comments). BIA's study and MMTC's study each demonstrated that platforms spawn additional formats; our study showed that within the family of rock formats, platforms produce variety by giving birth to hybrids. Our data regarding platforms' impact on families of formats (e.g. country-western) was inconclusive. The benefits of format variety can be overstated, however. One commenter provided an example of how one of its stations, in Seattle, switched from a country to an 80s format. The commenter offered this as an example of how "group ownership promotes numerous public interest benefits through reduction in costs, funding for expensive or risky programming, and program diversity." Viacom Comments at 66. See also id. (mentioning a San Francisco station that developed the "Wave" format.) Fortunately, this commenter has done much more for program diversity than figure out how to play 20 year old records. The 80s format and the "Wave" are not niches. They are hybrids, and as such they are weak reeds on which to justify deregulation.

independents could not offer, individually or collectively simply because the six independents do not enjoy the efficiencies of the platform.[27/]

All signs in this proceeding point to a global conclusion: the Commission should foster and protect coexistence between platforms and independents.

IV. The Threat To Independents From Consolidation Is Real

A. Independents Generally Cannot Change Format In Order To Survive

As MMTC demonstrated in its Comments, a small station is not a chameleon, capable of changing format at will as a survival strategy. Although a platform owner can easily change one of its station's formats, it is difficult and often cost-prohibitive for an independent to conduct extensive research, fire or retrain most of its staff and suddenly adopt an entirely new on-air identity.[28/]

Professor Hausman spoke of the "ease with which radio stations are able to switch formats, concluding that any attempt to exercise market power by unliateral action would be defeated by other stations switching to another format."[29/] The NAB offered a similar conclusion, relying on a BIA study which the NAB characterizes as illustrating "the relative ease with which lower

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27/ Some have contended that a platform will actually deploy the savings generated from its efficiencies by sending all of the locally-earned revenues to corporate headquarters and thence to its shareholders, and providing only minimal local service. There is strength to this argument, but candidly the evidence on both sides is anecdotal and inconclusive. This is a fruitful area for empirical research.

28/ See MMTC Comments, pp. 41-45.

29/ Statement of Professor Jerry A. Hausman (Exhibit 6 to Clear Channel Comments) (the "Hausman II" declaration), p. 11.

rated stations may improve their ratings and challenge market leading stations by altering their formats."[30/] That characterization is certainly true for stations in platforms. As BIA's study pointed out, "local consolidated operations" that change format "can successfully discovery the format 'holes' not being served in local marketplaces." Professor Hausman's analysis and BIA's study did not include the relative format-changing difficulties faced by independents vis-a-vis platforms.

On the record before it, the Commission should conclude that stations in platforms can easily change formats in order to compete, while independents usually cannot avail themselves of this survival strategy.

B. The Commission Should Respond Quickly When It Receives Complaints Of Selling Spots Below Cost Or Giving Away Spots On A Station In Order To Destroy A Same-Format Independent

MMTC has received complaints to the effect that group owners sometimes engage in anticompetitive practices at the expense of minority broadcasters.

To be sure, not all companies are guilty. Viacom, for example, affirmed that

> Infinity stations...do not force a cluster sale, letting the advertisers needs dictate the sale. Infinity stations allow the advertiser to choose whether it would like to work with a sales representative that represents all of the station in the market or work with the sales representatives at each individual station. Infinity [does not] force[] that advertiser to buy time on undesirable stations or preclude its ability to work with individual station representatives. 31/

30/ NAB Comments at 38, *citing* BIA Financial Network, "Volatility of Radio Market Shares" (2002) (Attachment C to NAB Comments).

31/ *See* Viacom Comments at 67.

This policy accurately reflects Infinity's practices, but unfortunately it does not reflect industrywide practice. Far too often, platforms sell spots below cost in order to force out same-format competitors. Platforms also coerce or induce advertisers to buy time on some stations in order to secure favorable rates on others. This kind of abuse most often adversely affects small and minority broadcasters.

As a practical matter, only the Commission has the ability to fully document and measure this practice. Until it does, the Commission should be very cautious about deregulating further.

V. How The Commission Can Protect Diversity

A. The Commission Should Not Consider Formats When Processing Form 314 and 315 Applications

Salem proposed that when the Commission evaluates a station sale, the agency should be prohibited from taking into account the format of the buyer.[32/] Salem is absolutely right. Fortunately, the Commission has never considered formats in conjunction with station sales, although under the previous administration it was DOJ's policy to do that. Between 1997 and 2000, DOJ effectively killed three or four sales that would have gone to minorities. DOJ's theory was that the minority buyer was likely to have a different format from the seller, thereby reducing competition in the seller's format. That policy was shameful, for several reasons. First, it stereotyped minorities to assume, on no basis other than their race, that they intended to broadcast in a particular format. Second, formats can often be changed. Third,

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32/ Salem Comments at 7.

those using minority and (like Salem) religious formats are pursuing the same advertisers as other broadcasters.

Last year, MMTC called this problem to the attention of the new administration at DOJ, and was delighted to learn that DOJ has put an end to this discriminatory practice.

As noted above, the Commission does not consider radio formats in conjunction with assignments and transfers. However, it has not publicly announced that policy. Such an announcement, especially if coordinated with DOJ, would give the capital markets confidence that investing in or lending to minority owned or religious broadcasters will not encumber capital with delay or discriminatory frustration of purpose.

B. Commission Review Of Advertising Revenues Is Justified To Promote Diversity, And Is Also Justified To Promote Competition If DOJ Abstains From Review

It should be disturbing that "many smaller markets generate insufficient radio advertising revenues to support more than two viable ownership groups able to provide quality, cost-effective products to listeners and advertisers."[33/] Although intended as an argument to abandon protection of independents, this was actually a strong argument for re-regulation. Independents survived just fine for 70 years with this same ad revenue. Now, thanks to consolidation, some say that independents are irrelevant in small markets. Apparently, some of those small markets may have already tipped beyond the point where independents can survive. Diversity in these markets needs surgery, not euthanasia.

33/ Cumulus Comments, p. 18.

Many commenters took the position that FCC advertising revenue review duplicates the work of DOJ's Antitrust Division. These comments have considerable logic behind them. FCC advertising revenue limits probably should not be justified as a way of protecting the advertising industry from price gouging or from the price inefficiencies flowing from oligopoly. These are important issues, but they are closer to DOJ's mission than they are to the FCC's mission.

The Commission does have a role in ensuring the competitiveness of the radio industry, so it would be inaccurate to suggest that radio advertising competition should never be any of the Commission's business. Nonetheless, if DOJ provides assurances that it will not abstain from effective enforcement in this area,[34/] then there would generally be no need for FCC competition analysis of advertising revenues. However, if DOJ is unable to provide comprehensive enforcement in this area, and no one else but the FCC is available to do so, the FCC should continue to regulate until DOJ is able to fulfill its responsibilities in this area.[35/]

34/ In particular, given its resources, DOJ may be unable to review the competitive health of certain radio markets or transactions between they are too small to concern the Department. Small markets are where new entrants most commonly enter the business. Thus, the Commission should not let small markets fall through the regulatory cracks.

35/ The FCC might take a page from EEO regulation. In 1978, the

FCC and the EEOC arranged to share jurisdiction in a non-overlapping way. The FCC is authorized to investigate media EEO allegations that make out a gross violation of the Commission's rules. _See_ _Memorandum of Understanding Between the Federal Communications Commission and the Equal Employment Opportunity Commission (R&O)_, 70 FCC2d 2320, 2327 (1978).

The fact that the FCC is not the ideal regulatory agency to review competitiveness in advertising revenues does not mean that FCC review of advertising revenues has no purpose. Review of how much money is available to broadcasters in a market is a critical and necessary component of the Commission's efforts to promote source diversity and viewpoint diversity. In particular, the Commission has a fundamental interest in ensuring that a market does not tip to the point where independent owners cannot survive or thrive. Such tipping occurs when the advertising revenues left for independents, after the platforms take their share of the pie, is so low that it is insufficient to cover the independents' unavoidable fixed costs of operation. Those costs include rent, utilities, engineering, and some sort of program service, preferably a meaningful local one. In that sad scenario, the market has tipped because the Commission has failed to protect diversity.[36/]

C. The Screen Is The Wrong Way To Oversee Advertising Revenues

The screen is a classic instance of a regulatory impediment to small entrepreneurship that should be eliminated pursuant to

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36/ We set out at pp. 22-27 *infra* a mathematical model for a radio revenue test aimed at protecting diversity. It would be a coincidence if this or any other mathematical model geared to diversity also happened to be the right model to protect competition. Advertisers' welfare is seldom maximized by the same mathematical imperatives as consumer welfare. A model geared to competition, such as the HHI, might be more appropriate if the Commission (e.g., through DOJ's abstention) finds that it must review advertising revenue share in order to promote competition.

Section 257 of the Act.[37]

Irrespective of the outcome, a flag generates unanticipated delay. For a small entrant, that delay can be crippling or fatal. Small entities that raise the capital for an acquisition often must encumber their other assets in order to secure the equity or debt needed to complete the acquisition. During the time the deal is pending, these other assets cannot be used as security for any other transactions. Cash in hand, pledged or escrowed, cannot be used productively. Nor can a small company buy something else while its deal is pending, as a large company could do.

Thus, we agree with industry commenters who want the Commission to eliminate the screen. The screen was a good concept, but it suffered from the Commission's insufficient resources and consequent long delays. A bright line rule is preferable.

D. A Formula Can Be Designed To Leave Independents With Enough Revenue To Survive And Thrive

In this section, we offer a bright-line advertising revenue formula designed to protect diversity. We submit that this approach far more closely represents what actually happens in radio markets than an arbitrary, one-size-fits-all screen, whether the screen is 35/50, 50/70 or 80/90. We begin with an example, proceed inductively to a formula, and then apply the formula to the Syracuse market.

Suppose a market has twelve stations and six licensees -- two four-station platforms and four standalones. Each independent

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37/ See 47 U.S.C. §257(c) (requiring the Commission to report periodically to Congress on its efforts to "any regulations prescribed to eliminated barriers [to entry] within its jurisdiction.") See discussion in MMTC Comments, pp. 65-67.

requires $150,000 in fixed operating costs just to survive on the air, and an additional $100,000 per year to "thrive" -- i.e., provide a meaningful local service (e.g., having a news department, originating public affairs programs and producing its own PSAs).

Since the independents are not equal to one another in financial stability and resources, an additional $200,000 in market revenues (an average of $50,000 per station) must be available to spread around among the independents so that the weakest well-run independent will survive. Similarly, the independents will collectively need another $100,000 (an average of $25,000 per station) so that the weakest well-run independent will provide a meaningful local service.

On these admittedly rough assumptions, the independents collectively would need $1,300,000 per year in revenue in order to provide viewpoint diversity -- $700,000 of which is needed just to keep them all alive.

Suppose the radio revenues in the market are $3,000,000 per year. In this market, if the top two groups take no more than $1,700,000 ($3,000,000 minus $1,300,000) -- that is, 57% of the revenue, they would not inhibit viewpoint diversity. At that "local service tipping point," the independents must begin to lay off their programming staff and start simulcasting or airing satellite feeds almost exclusively.

Further, if the top two groups take no more than $2,300,000 ($3,000,000 minus $700,000) -- that is, 77% of the revenue, they will not threaten the survival of their competitors. That 77% figure is the "survival tipping point" at which the independents begin to go dark or desperately seek buyers at any distress price.

With this approach, advertising revenue limits that promote diversity would involve these variables and coefficients:[38/]

MR — market revenues

MR1 — amount of market revenues drawn by largest platform

MR2 — amount of market revenues drawn by second largest platform

IN — number of independent stations in the market

SU — minimum fixed cost for an independent station to stay on the air ($150,000 in our example)

VFSU — variability factor for survival operations, reflecting the average amount of revenues per independent station that must be available in the market, collectively, to take account of variations among the independent stations and thereby ensure that well-run weak independents stay on the air ($25,000 in our example)

LS — minimum additional cost, beyond SU, for an independent station to offer a meaningful local service ($100,000 in our example)

VFLS — variability factor for local service reflecting the average amount of revenues per independent station that must be available in the market, collectively, to take account of variations among the independent stations and thereby ensure that well-run weak independents remain viable ($50,000 in our example)

LSTP — local service tipping point: the point at which, if the top two groups control more revenue, independents will begin to lose their ability to offer meaningful local service

SUTP — survival tipping point: the point at which, if the top two groups control more revenue, independents will be unable to meet their fixed operating costs and must, therefore, sell out or go dark.

38/ The cost of maintaining a station on the air varies somewhat depending on local market factors. These costs are greater in markets with unique local conditions, like Anchorage and New York City (which feature extraordinarily high labor and real estate costs). Fortunately, regional or local differences can be designed into a formula by indexing to a market's cost of living relative to the national average. This kind of issue could be addressed in a negotiated rulemaking. See MMTC Comments, pp. 174-76.

Thus, LSTP is where:

IN (SU + VFSU + LS + VFLS) = MR - (MR1 + MR2)

and SUTP is where:

IN (SU + VFSU) = MR - (MR1 + MR2).

The Commission always knows MR, MR1, MR2 and IN, and based on its expertise the Commission can establish fixed values for SU, VFSU, LS and VFLS. Thus, the Commission will be able to adopt a rule that adequately protects all interests and can be applied by anyone who can perform 9th grade algebra.

Here is how our formulas and numerical assumptions would work in Syracuse. According to the BIA Radio Market Report (2002), Syracuse is radio market #79. In 2001, the Syracuse market's radio revenues (that is, MR) was $30,600,000. The top grossing group, Clear Channel, had seven stations. The second group, Citadel, had four stations. Syracuse is a 32 station market, so IN is 21.

As above, let us take SU to be $150,000, VFSU to be $25,000, LS to be $100,000 and VFLS to be $50,000.

It follows, then, that in Syracuse, IN (SU + VFSU + LS + VFLS) is $6,825,000. This means that after the two major platforms take their share of ad revenue, $6,825,000 must remain in order for the other stations to provide meaningful local service.

Further, IN (SU + VFSU) is $3,675,000. This means that after the two major platforms take their share of ad revenue,

$3,675,000 must remain in order for the other stations to survive.

In Syracuse, MR is $30,600,000. Thus, if MR1 + MR2 (that is, the two platforms' combined ad revenues) are less than $23,775,000, the market will not have reached the local service tipping point.

Similarly, if MR1 + MR2 is less than $26,925,000, the market will not have reached the survival tipping point.

How does this compare to the actual situation in Syracuse? In 2001, the top grossing group, Clear Channel, had $15,800,000 in revenue (51.6% of the market total). The second grossing group, Citadel, had $7,700,000 in revenue (25.2% of the market total). Thus, MR1 + MR2 was actually $23,500,000, accounting for 76.8% of the market's ad revenue.

In our model, LSTP, the local service tipping point, would be 77.7% (that is, $23,775,000/$30,600,000), and SUTP, the survival tipping point, would be 88.0% (that is, $26,925,000/$30,600,000). In Syracuse, as noted above, the top two groups' combined market shares of ad revenue are actually 76.8%. That means, using our formula (including its admittedly imprecise coefficients) the market is far below the survival tipping point, but it is very close to the local service tipping point.

The actual coefficients applicable to the industry as a whole (SU, VFSU, LS and VFLS) could be worked out by economists through an objective and rational process. This process should yield a formula everyone can understand and easily apply. The results may be different from the above example, but whatever the outcome it will have the benefit of being objective.

This approach is far more rational than arbitrarily imposing fixed percentages. Numbers like 50% or 70% are not irrational on their face, and they may be fairly close to the values needed to promote diversity in many markets, but we do not understand where they came from and neither would a reviewing court. A formula tailored closely to the operating realities of the radio business, such as our model above, is much more likely to be fair, to attract industry acceptance, to achieve the desired result, and to survive judicial review.

VI. The Commission Should Convene A Negotiated Rulemaking

In our initial Comments, we urged the Commission to convene a negotiated rulemaking.[39/] Review of the first round of comments underscores why a negotiated rulemaking would be a useful step before the Commission issues its decision.

First, several research studies filed in this proceeding yielded good and incontestable data, yet gave rise to different conclusions. Having the scholars convene and compare methodologies would allow the Commission to understand the assumptions that led to the differing results.

Second, a negotiated rulemaking offers a way for the advocates to narrow their disagreements, thereby reaching consensus on at least some of the issues and making the Commission's task easier.

Third, a negotiated rulemaking offers a means of permitting consumer groups, civil rights organizations and others short on resources to have full access to the decisionmaking process.

Fourth, and relatedly, a negotiated rulemaking is a way to fully examine issues raised only or largely by non-industry parties -- particularly the issue of minority ownership.

Fifth, deregulation proposals in these comments often invoked the fact that television (whether regarded as part of the same market or as part of a different but related market) also offers ________________________

39/ See MMTC Comments, pp. 174-76.

multiple voices.[40/] However, television and cable ownership are also being deregulated. Attempts to base radio deregulation on the moving target of video voices would be imprecise at best. A holistic examination of all media, as is possible in a negotiated rulemaking, can help the Commission appreciate whether deregulation in any of the media industries is appropriate.

Perhaps the best reason to have a negotiated rulemaking is that the Commission is having a losing streak in court. By bringing the warring parties together in a room, the Commission can enhance the likelihood that the decision it must ultimately render will survive judicial review.

Respectfully submitted, 41/

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40/ See, e.g., NAB Comments at 28 (pointing to the "wide variety of entertainment and informational programming" in other media besides radio as a reason for the Commission to "have even less cause for concern about any lack of diversity in the market place of ideas.")

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